

POSITION

1 EXCLUDE UNFAIR - ADVERTISING ONLY

2. " " - RULE MAKING + SMIB

3. " "

3.A PROPOSE A DEFINITION OF UNFAIR  
REQUEST FOR COMMENTS REGARDING THE FEDERAL TRADE  
COMMISSION'S ADVERTISING SUBSTANTIATION PROGRAM

4. ANA PULLS BACK FROM SITUATION

AGENCY: Federal Trade Commission

ACTION: The Federal Trade Commission is requesting comments from the public regarding the implementation of its advertising substantiation requirement.

SUMMARY: The Federal Trade Commission is undertaking a review of the implementation of its advertising substantiation requirement. Under a legal doctrine announced in 1972, advertisers are expected to have a "reasonable basis" for the objective claims they make in advertising. The amount of support an advertiser is expected to have, i.e., what constitutes a "reasonable basis" for a particular claim, is flexible and depends on factors such as: (1) the type and specificity of the claim made; (2) the type of product; (3) the possible consequences of a false claim; (4) the degree of reliance by consumers on the claim; and (5) the type and accessibility of evidence adequate to form a reasonable basis for making the particular claim. The Commission is seeking comments on various aspects of how it applies the ad substantiation requirement.

FOR FURTHER INFORMATION CONTACT: Collot Guerard, Federal Trade Commission, Bureau of Consumer Protection, 724-1499, Washington, D.C. 20580.

COMMENTS: Comments should be filed in Room 130, Federal Trade Commission, 6th & Pennsylvania Avenue, N.W., Washington, D.C. 20580, no later than July 15, 1983.

SUPPLEMENTARY INFORMATION: Under Commission law and policy, advertisers are expected to have a reasonable basis for objective claims in advertising before an ad is disseminated. The Commission remains committed to this principle, which has been an important element of the Commission's program for deterring unfair and deceptive claims and preserving public confidence in the reliability of advertising. By undertaking this public inquiry, the Commission does not intend to depart from this basic requirement. Any perception that the Commission is relaxing the requirement that advertisers possess a reasonable basis when they make objective claims would be wrong. Some aspects of the implementation and application of the ad substantiation requirement have been controversial and unclear, however. The Commission seeks information about the administration of the doctrine in order to improve it.

There are several reasons why advertisers should possess a reasonable basis for their objective claims. First, consumer dissatisfaction over deceptive claims creates an incentive for firms to possess a reasonable basis that a claim is true before making it to consumers. Otherwise, firms risk damaging their reputations, one of the most valuable assets for companies that advertise. Second, as part of the self-regulatory process, which includes possible consideration by the National Advertising Review Board and pre-clearance by the major television networks, advertisers are required to possess a reasonable basis. Finally, as explained above, the Commission requires that advertisers possess a reasonable basis when they make certain claims. In

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these circumstances, consumers are likely to expect that claims made by advertisers are supported by a reasonable basis.

The Commission has implemented the substantiation requirement in two ways. First, it has ordered firms within certain selected industries to submit substantiation for specific ad claims, pursuant to its authority under section 6(b) of the FTC Act. Between 1971 and 1981, the Commission conducted 29 of these industry-wide rounds. Second, the Commission has implemented the program on a case-by-case basis, in which the staff asks an individual advertiser to provide substantiation for claims made in its advertising. Both processes have led to a number of law enforcement actions. As of January 1, 1983, the Commission has issued 21 litigated orders and 126 consent orders. Firms under these orders are subject to civil penalties if they fail to possess a reasonable basis for future ad claims.

The Commission is absolutely committed to fulfilling its mandate to police the marketplace to prevent unfair or deceptive advertising. As part of that effort, the Commission has relied on its prior substantiation doctrine, a requirement whose general concept has received very wide support, including support from all members of the current Commission. Chairman Miller and others, however, have identified several questions concerning how the Commission applies the requirement. For example, do advertisers realize which claims require substantiation, or is the line between objective performance claims requiring substantiation and subjective claims that do not need substantiation unclear? Moreover, and closely related, how

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should the doctrine be applied to implied claims that are not reasonably apparent on the face of the ad and whose very existence is in dispute? Further, has the amount of evidence required as a "reasonable basis" sometimes been excessive, thereby deterring truthful advertising that would be useful to consumers? Finally, should the Commission evaluate substantiation that is not developed or produced until after a claim has been made and if so, how and when?

The Commission's staff has been engaged in an ongoing study of specific aspects of the administration of the advertising substantiation program, to address these and other questions. To facilitate systematic evaluation, the Commission is soliciting data and comments bearing on the implementation of the requirement. Although it is also interested in receiving comments on other issues relating to ad substantiation that seem important to the commentor, the Commission is particularly interested in the general issues outlined below, and the specific questions raised under each. We are seeking comment from interested individuals and groups on these issues, including advertisers, ad agencies, consumer research houses, academics, consumers and consumer groups, advertising media, advertising self-regulatory groups, and trade associations. The Commission is particularly interested in specific comments and any available supporting evidence. Empirical evidence such as surveys would be most useful if accompanied, to the extent possible, by relevant underlying data and details concerning methodology.

A. PROCEDURES FOR IMPLEMENTING THE AD SUBSTANTIATION PROGRAM

1. As noted above, the FTC has sought substantiation either by industry-wide rounds (Section 6(b) orders) or on an individual basis. In both cases, the substantiation is treated confidentially, but law enforcement initiatives against individual companies may result. What has been the impact of each process? Comments from companies who have received both a 6(b) order and an individual request for information would be particularly useful.
2. Should the Commission employ one process instead of another, and if so, under what circumstances?
3. Could either process be improved, and if so how?
4. When should the ad substantiation program be used as a broad investigatory tool to develop possible cases e.g., by requesting substantiation from all firms in an industry, and when should it be used as a more narrowly focused tool to explore alleged problems?

B. STANDARDS FOR REVIEWING SUBSTANTIATION OR STANDARDS INCLUDED IN REASONABLE BASIS ORDERS

1. Are general standards (e.g., possess and rely on a reasonable basis) for advertisers/ad agencies under order preferable to specific standards (e.g., two well controlled clinical studies)? Why?
2. Would advertisers and ad agencies affected by the Commission's program prefer to have specific standards issued, such as (depending on the product and the claim made for it):
  - two well-controlled double-blind clinical studies;
  - written results of dynamometer testing according to test cycles established by an agency or department of the United States government;
  - a written certification from the manufacturer, proprietor or licensee of the brand name, or qualified testing laboratory that there is a reasonable basis;
  - valid and reliable scientific evidence;
  - competent and reliable objective materials available in written form;
  - competent and reliable opinions of engineering or other experts.

Please explain why.

3. Could specific standards for the reasonable basis requirement be clearer? If so, how? How do advertisers and agencies under order interpret such phrases as "two well controlled clinical tests" in terms of parameters of the tests such as sample size, confidence levels, etc?
4. Would a reasonable basis order that included both a general and a specific standard, either of which the advertiser/ad agency under order could follow at their option, be preferable?

5. In determining the amount of substantiation to require of an advertiser/ad agency under order, how should the Commission balance the risk of suppressing truthful information against the risk of allowing dissemination of deceptive information?
6. Under current law, advertisers are required to have a reasonable basis for factual claims before the ad is disseminated. Should subsequent substantiating evidence (developed after a claim is made) be evaluated in FTC enforcement proceedings and, if so, how and when? Specifically, should any such evaluation consider:
  - when the post-claim evidence was actually developed (i.e. before or after an investigation is initiated)?
  - whether the advertiser reasonably believed that the ad did not make the claim for which substantiation is sought?
7. What tests, protocols, or other procedures do advertisers and ad agencies conduct to ascertain which claims their advertisements convey to consumers? Please provide specific examples.

C. EXPECTATIONS OF CONSUMERS

1. The Commission believes that consumers expect that advertisers have support for certain claims they make in advertising. Please provide any consumer research or other evidence to support or refute this point, including as much specific information as possible.
2. If an ad states explicitly that it is based on clinical tests, or some other particular kind of evidence, consumers are likely to expect the advertiser to possess the evidence identified. For claims that are less explicit, however, the amount of substantiation that consumers expect is less clear. Even when an advertisement identifies a particular basis, issues arise concerning the quantum or quality of substantiation that consumers expect. For example, when an ad claims that it is based on tests, how sophisticated or extensive do consumers expect the tests to be? If an ad claims that it is based on medical opinion, what kind and amount of opinion do consumers expect? Please provide any consumer research or other evidence regarding the amount of substantiation that consumers expect in such instances including as much specific information as possible.
3. The Commission also believes that consumers' expectations about the amount of substantiation depend on a variety of factors, including: the product, the type and specificity of the claim, the possible consequences of a false claim, the degree of reliance by consumers on the claim, and the type and accessibility of evidence adequate to form a reasonable basis. For instance, consumers may expect a higher quantum and better quality of substantiation for health and safety claims, or claims that contain specific details, or claims that use the words "proves" or "guarantees." Please provide any consumer research or other evidence addressing how expectations differ depending on these factors, including as much specific information as possible. The Commission is also interested in any evidence addressing the quantum or quality of substantiation consumers expect for:
  - objective performance claims making no reference to specific evidence;
  - claims in which a competitor is named or implied;
  - claims for frequently-purchased, inexpensive products that are easily evaluated by the consumer at a low cost;



-- claims concerning subjective product attributes,  
such as taste, appearance, or smell.

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D. RELATIONSHIP OF FTC AD SUBSTANTIATION PROGRAM TO SELF-REGULATORY BODIES

1. What effect, if any, did the establishment of the FTC substantiation requirement have on the advertising standards set by companies for internal use, by self-regulatory bodies, or by others?
2. How, when, and why did the self-regulatory units, including the network continuity clearance departments, develop? Is there a regulatory unit similar to continuity clearance for national print ads?
3. What substantiation, if any, did advertisers and agencies develop before the FTC established the reasonable basis requirement? If substantiation was developed, why? What kind of documentation was developed?
  - If documentation was developed, did the FTC's requirement change the type or amount of documentation? If yes, how did the requirement affect the documentation?
4. What documentation do advertisers and ad agencies develop for other purposes, such as network copy clearance, National Advertising Division (NAD) review, or otherwise? Is the same documentation developed for these purposes as is developed in response to the FTC's ad substantiation requirement?
5. Substantiation developed by advertisers and ad agencies can be reviewed by a variety of regulatory bodies including the networks, the NAD, and the FTC. Do the standards differ among the networks, the NAD, and the FTC? How? Is one entity more stringent than another with respect to particular areas of advertising? How?
6. Do the types of claims pursued by the FTC and self-regulation units differ? If so, please explain.

7. To what extent are the decisions by the network clearance departments or by the self-regulation units based on FTC decisions and orders, policy statements, or guides?
8. What effect does the FTC's ad substantiation program have on self-regulation today?
9. How have the decisions by the networks or the self-regulatory units differed from those of the FTC?
10. What has been the effect on advertisers/ad agencies of decisions by the NAD, or courts under the Lanham Act?
11. Do self-regulatory bodies require advertisers/ad agencies to provide substantiation to support the implied--as well as the express--claims they make in advertising? If so, what sorts of documentation do they require advertisers/ad agencies to provide to support implied claims? How do they ascertain what implied claims exist?

E. ROLE OF GOVERNMENT AGENCIES OTHER THAN THE FTC

1. Do government agencies other than the FTC, including state and local government, have an effect on how advertising claims are made? Please explain what the agencies are and their effect.
2. What effect, if any, has the FTC's prior substantiation requirement had on advertising regulation by state and local governments?
3. Is there inconsistency between standards and requirements followed by other government agencies and by self-regulatory units?

F. COMPLAINTS

1. Under what circumstances does an advertiser complain to the NAD? To the networks? To the FTC? Commence a private law suit under Section 43 of the Lanham Act?
2. How often, and under what circumstances, do consumers complain to advertisers or to other institutions about advertising?
3. How often does one advertiser complain privately to another about that company's advertising?
4. How much does it cost an advertiser or consumer to pursue to final resolution a complaint before the networks? Before the FTC? Before the NAD? In court under the Lanham Act?

G. BENEFITS OF THE FTC'S AD SUBSTANTIATION PROGRAM

For the following questions addressing benefits and costs of the substantiation program, we are particularly interested in academic research. For example, such research might include studies of changes in advertising for an industry or a specific product as a result of specific Commission action. Studies comparing advertising before and after the substantiation requirement was announced would also be useful.

1. What are the benefits of the ad substantiation program? Please submit any available data documenting such benefits.
2. What changes have occurred in the content of advertising since the inception of the ad substantiation program in 1972? Have there been more or less of some types of claims since the ad substantiation program came into existence? Have ads become more or less factual? To what extent are these changes attributable to ad substantiation?
3. Has advertising become more accurate and believable since 1972? What data or other information support or refute this proposition? What factors explain this proposition, if it is true? If it is true, to what extent has it lessened the overall cost of advertising?
4. Has the ad substantiation program deterred dissemination of false ads or ads that omit material information and, if so, how? Is the current deterrent effect sufficient?
5. Have there been other benefits of the ad substantiation program? Please explain.

H. COSTS OF THE AD SUBSTANTIATION PROGRAM.

1. What are the costs of the ad substantiation program? Please submit any available data documenting such costs.
2. There may be claims that an advertiser believed were adequately substantiated but decided not to make because of concerns about substantiation. For example, have advertisers avoided claims concerning scientific controversies in the belief that the Commission would require a higher degree of substantiation than the advertiser possessed? Have there been claims that an advertiser believed were adequately substantiated, but for which self-regulatory bodies requested additional support? Have advertisers in such circumstances revised or abandoned claims rather than develop additional evidence? What was the specific reason that the claim was not made? Please provide specific examples if possible.
3. What has been the additional cost, if any, of developing documentation to meet the general ad substantiation requirement beyond the cost of documentation that would have been developed in any event? What has been the cost of responding to FTC requests for substantiation for individual requests? For Section 6(b) industry-wide requests?
4. Have advertisers developed materials because of the ad substantiation requirement that they would not have developed for the networks, or other purposes? What has been the cost of developing those materials?
5. What has been the cost of complying with an FTC ad substantiation order for a company under order in terms of developing additional documentation? Has the effect of the ad substantiation doctrine been different on those companies under order from those only required to meet the general ad substantiation concept? If so, please explain how.
6. Has the ad substantiation program had any effect on advertising budgets or on advertising/sales ratios? Please explain.

7. What effect, if any, does the ad substantiation program have on the decision whether to prepare advertising in-house or use an ad agency? What cost, if any, has this effect imposed?
8. Has the ad substantiation program had different effects on large and small advertisers or agencies? What has been the significance of these effects? Please be as specific as possible
9. Are there any other costs associated with the ad substantiation program? Please explain.
10. On balance, how do the benefits of the program compare to its costs? Please explain.




## I. EFFECTS OF AD SUBSTANTIATION ORDERS

1. What has been the effect of an ad substantiation order against an advertiser on that advertiser? On other manufacturers of the same product? For example, have such companies instituted new review procedures, either for products subject to the order or for other products? Have companies developed additional supporting evidence? Please describe these changes, and provide any specific data.
  
2. What has been the effect of an ad substantiation order against a specific ad agency on that agency? On ad agencies that handle accounts for competing products? For example, do agencies under order find it more difficult to obtain new accounts for products covered by the order? Have such agencies instituted new review procedures, either for products subject to the order or for other products? Have agencies developed or requested additional supporting evidence? Please describe these changes, and provide any specific data.

J. RECOMMENDATIONS

1. What changes in the implementation of the ad substantiation requirement, if any, would improve the program?

By direction of the Commission.



Benjamin I. Berman  
Acting Secretary

DATED: March 3, 1983

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